Supreme Court, U.S.
FILED
JAN 12 2007
OFFICE OF THE CLERK

No. 06-535

In The Supreme Court of the United States

RODNEY HANS HOLM,

Petitioner,

vs.

STATE OF UTAH,

Respondent.

On Petition For Writ Of Certiorari To The Utah Supreme Court

BRIEF IN OPPOSITION

MARK L. SHURTLEFF
Utah Attorney General
KIRK M. TORGENSEN
Chief Deputy Attorney General
J. FREDERIC VOROS, JR.
Chief, Criminal Appeals Div.
LAURA B. DUPAIX*
Assistant Attorney General
Counsel for Respondent
160 East 300 South, 6th Floor
Post Office Box 140854
Salt Lake City, UT 84114-0854
(801) 366-0180

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Does *Reynolds v. United States*, 98 U.S. 145 (1879), preclude extension of modern liberty rights to religious polygamists who do not seek legal recognition of their relationships?

2. Does state criminalization of private polygamous relationships between consenting adults violate the liberty protected by the Due Process Clause of the Fourteenth Amendment?

3. Does Utah's bigamy law target religion in violation of the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, by making participation in a private religious ceremony an element of the crime?

4. Were Petitioner's constitutional rights of due process and confrontation violated when the State failed to prove the jurisdictional elements of the crime, and when the trial court sustained the State's objection to Petitioner's effort to prove that the alleged acts took place outside the State of Utah?

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INTRODUCTION AND SUMMARY OF REASONS FOR DENYING THE WRIT

This case does not involve consenting adults. It involves an arranged polygamous and sexual relationship between a thirty-two-year-old adult and his sixteen-year-old sister-in-law, who conceived two of his children before her eighteenth birthday. As a result of his conduct, Petitioner was convicted of two counts of unlawful sexual conduct with a sixteen- or seventeen-year-old, a third degree felony. He was also convicted of one count of bigamy, also a third degree felony.

Petitioner presents four issues for review. The first three issues go to the constitutionality of Utah's bigamy statute under the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Free Exercise Clause of the First Amendment. The fourth issue goes to the territorial jurisdiction of Utah courts over the charges of unlawful sexual conduct with a sixteen- or seventeen-year-old.

The Court should deny certiorari review of the first issue because it challenges only the comments of a single justice in his concurring opinion. The majority opinion never addressed, and was not asked to address, whether *Reynolds v. United States*, 98 U.S. 145 (1879), precludes extension of modern liberty rights to religious polygamists.

This Court should deny the writ as to the second issue – whether state criminalization of private polygamous relationships between consenting adults violates the liberty protected by the Due Process Clause – because this case does not involve consenting adults. It involves a minor. Petitioner lacks standing to advance the liberty

interests of hypothetical consenting adults not before this Court.

This Court should deny the writ as to the third issue – whether Utah's bigamy statute impermissibly targets religion in violation of equal protection and free exercise – because it does not raise an issue of widespread national importance. Nor is this case a suitable vehicle for addressing these claims. Petitioner acknowledges that Utah's bigamy statute is "unique." Thus, any decision by this Court is unlikely to affect the laws in other states. Moreover, Petitioner's equal protection claim amounts only to a narrow selective prosecution challenge for which there is no record support. His free exercise claim is merely a disagreement with the Utah Supreme Court's conclusion that Utah's bigamy statute is neutral and generally applicable. Finally, Petitioner's claim that Utah's bigamy statute targets religion is refuted by the only two prior reported modern bigamy prosecutions in Utah, one of which involved a secular bigamist.

This Court should deny certiorari review of Petitioner's fourth issue because it is nothing more than an attempt to inflate a garden variety state jurisdictional issue into a federal constitutional claim.

STATEMENT OF THE CASE

1. *Summary of the facts.* Ruth Stubbs, the victim in this case, grew up in Colorado City, Arizona. R. 523:429, 432-33. Colorado City and its adjacent twin – Hildale, Utah – straddle the Arizona/Utah border. The communities are populated primarily by members of the Fundamentalist Church of Jesus Christ of Latter-day Saints (the

"FLDS Church"), who practice polygamy as a tenet of their religion.[1] *See* R. 523:291-94. Marriages in the FLDS Church are arranged by the head, or prophet, of the church. R. 524:558-61, 608-19; R. 523:481.

In 1986, Petitioner Holm, a member of the FLDS Church, legally married Suzie Stubbs, Ruth's older sister. *State v. Holm*, 2006 UT 31, ¶ 2, 137 P.3d 726. He subsequently participated in an unlicensed religious marriage ceremony in which he took Wendy Holm as his second wife. *Id.* When Petitioner was thirty-two, he purported to marry his sixteen-year-old sister-in-law, Ruth Stubbs, in another unlicensed religious marriage ceremony. *Id.*

Ruth, who had only a sixth-grade education, did not want to marry Petitioner. She wanted to marry a younger FLDS single man that she had been seeing. R. 523:430, 436-38; R. 524:593-94. She asked Rulon Jeffs, who was then the prophet of the FLDS Church, for permission to marry her boyfriend. R. 523:438-45, 484. Jeffs instead told Ruth that she should marry Petitioner. R. 523:442-44.

Ruth "just cried" when she heard Jeffs's pronouncement, but agreed to marry Petitioner. R. 523:444-45, 484-85. Within twenty-four hours, she and Petitioner were married in a private, unlicensed religious ceremony in Jeffs's Hildale, Utah home. Ruth wore a white wedding dress; she and Petitioner exchanged vows; Warren Jeffs, a religious leader in the FLDS Church, performed the

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[1] Although often referred to as "fundamentalist Mormons," the FLDS Church has no connection to the Church of Jesus Christ of Latter-day Saints ("LDS Church" or "Mormon Church"), which renounced the practice of polygamy in 1890.

ceremony and pronounced the two "legally and lawfully husband and wife." *Holm*, 2006 UT 31, ¶ 4.

Petitioner and Ruth consummated their marriage on their wedding day. R. 524:541. After that, they shared a Hildale, Utah house with Petitioner's two other wives and their numerous children. R. 523:455. Petitioner and Ruth regularly had sexual intercourse in their Utah home and by the time Ruth turned eighteen, "she had conceived two children with Holm, the second of which was born approximately three months after her eighteenth birthday." *Holm*, 2006 UT 31, ¶ 2. *See also* R. 524:456-58; R. 524:541.

2. *Summary of the proceedings.* Petitioner was charged with three counts of unlawful sexual conduct with a sixteen- or seventeen-year-old, in violation of Utah Code Ann. § 76-5-401.2, and one count of bigamy, in violation of Utah Code Ann. § 76-7-101, all third degree felonies. *Holm*, 2006 UT 31, ¶ 3.

A person commits unlawful sexual conduct with a sixteen- or seventeen-year-old if he is ten or more years older than the minor and, "under circumstances not amounting to rape" or other sexual crimes, he has sexual intercourse or other enumerated sexual contact with the minor. Utah Code Ann. § 76-5-401.2(2). This provision does "not apply to consensual conduct between persons married to each other." Utah Code Ann. § 76-5-407(1).

A person is guilty of bigamy in Utah "when, knowing he has a husband or wife or knowing the other person has a husband or wife, the person purports to marry another person *or* cohabits with another person." Utah Code Ann. § 76-7-101(1) (emphasis added).

After a preliminary hearing, the trial court dismissed one count of unlawful sexual conduct and bound defendant over for trial on the remaining charges. R. 69; R. 520:101-04. Two weeks before trial, Petitioner moved to dismiss all charges against him, arguing, among other things, that both the bigamy and the unlawful sexual conduct statutes were unconstitutional under *Lawrence v. Texas*, 539 U.S. 558 (2003). R. 106-80. The trial court denied the motion as untimely under a prior trial scheduling order. R. 191-94.

A jury convicted Petitioner as charged. By special verdict form, the jury found defendant had committed bigamy both by purporting to marry another person and by cohabiting with another person. Petitioner was given 36 months' probation on the condition that he serve one year in jail, with immediate access to work release. R. 504-06. Petitioner timely appealed. R. 412.

3. *Utah Supreme Court decision*. On appeal, Petitioner raised eleven statutory and state and federal constitutional claims, including whether Utah's bigamy statute was unconstitutionally vague, violated the Due Process Clause of the Fourteenth Amendment as interpreted by *Lawrence*, and violated the Free Exercise Clause. *See Holm*, 2006 UT 31, ¶¶ 10-103.

Statutory interpretation. The controversy below centered primarily on whether Petitioner had "purported to marry" Ruth Stubbs within the meaning of the bigamy statute. *See id.* at ¶¶ 16-33. Petitioner argued that "purports to marry" meant "purport to legally marry." He argued that because he did not obtain a state-issued marriage license for his marriage to Ruth, he did not "purport to marry" her. *Id.* at ¶ 18. The Utah Supreme Court held that "one need not purport that a second

marriage is entitled to legal recognition to run afoul of the 'purports to marry' prong of the bigamy statute." *Id.* at ¶ 28. The court concluded that Utah's "bigamy statute was intended to criminalize both attempts to gain legal recognition of duplicative marital relationships and attempts to form duplicative marital relationships that are not legally recognized." *Id.* at ¶ 26. Based on the facts of this case, the Utah Supreme Court concluded that "there can be no doubt that Holm purported to marry Stubbs." *Id.* at ¶ 29.

The Utah Supreme Court then rejected the claim that the "purports to marry" prong of the bigamy statute was unconstitutionally vague as applied to Petitioner. *Id.* at ¶¶ 76-77. Because the state court upheld Petitioner's bigamy conviction under the "purports to marry" prong of the statute, it did not reach the validity of Petitioner's conviction under the cohabit prong.[2]

Free exercise. The Utah Supreme Court held that under *Reynolds v. United States*, 98 U.S. 145 (1879),

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[2] Petitioner asserts that the majority opinion below "made clear that a person's participation in multiple private religious ceremonies with different partners could be prosecuted as bigamy, *even in the absence of any pre-existing legal marriage at all.*" Pet. at 5 (emphasis added). Petitioner is mistaken. Under the plain language of Utah's bigamy statute, knowledge of a pre-existing legal marriage is a prerequisite to a bigamy conviction. Utah Code Ann. § 76-7-101(1) (a person commits bigamy "when, *knowing he has a husband or wife* . . . , the person purports to marry another person or cohabits with another person"). The Utah Supreme Court has also held: "To successfully prosecute [defendant] under Utah's bigamy statute, the State had the burden of establishing that [defendant] was legally married and then purported to marry or cohabited with another woman." *State v. Green*, 2004 UT 76, ¶ 53, 99 P.3d 820. Nothing in the *Holm* opinion below can be read to relieve the prosecution of the burden of proving a prior legal marriage. In any event, Petitioner has never disputed that he was already legally married when he purported to marry Ruth Stubbs.

criminal prosecution of "a religiously motivated polygamist," did not violate the Free Exercise Clause. *Holm*, 2006 UT 31, ¶ 50. The court noted that "despite its age," *Reynolds* "has never been overruled by the United States Supreme Court and, in fact, has been cited by the Court with approval in several modern free exercise cases, signaling its continuing vitality." *Id.* at ¶ 51. But even assuming the validity of Petitioner's "assertion that *Reynolds* is antiquated beyond usefulness," the court noted that it had recently held in another case – in which a polygamist had married several underage girls – that Utah's bigamy statute was a neutral law of general applicability. *Id.* at ¶ 51 (citing *Green,* 2004 UT 76). Thus, even applying modern free exercise jurisprudence, Utah's bigamy statute did not run afoul of the Free Exercise Clause. *Id.* (citing *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990), and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993)).

Due process. The Utah Supreme Court held that the bigamy statute did not offend the Due Process Clause of the Fourteenth Amendment, as construed by *Lawrence*, because this case involved both a minor and the public social institution of marriage, two categories expressly excluded in *Lawrence*. *Id.* at ¶¶ 60-63.

Equal protection. The Utah Supreme Court held that the bigamy statute did not implicate any equal protection concerns because "the facially neutral text of the bigamy statute is not merely a smokescreen meant to disguise a discriminatory intent to prosecute only religiously motivated polygamy." *Id.* at ¶ 66. Rather, "the last reported decision concerning a bigamy prosecution prior to *Green* involved a man engaging in non-religiously motivated

polygamy. Ironically, the defendant in that case argued that the State of Utah selectively prosecutes only those bigamists who practice bigamy for other than religious reasons." *Id.* at 66 (quoting *Green*, 2004 UT 76, ¶ 28 n.10 (quoting *State v. Geer*, 765 P.2d 1, 3 (Utah App. 1988))) (internal quotation marks omitted). The state court further noted that "the record before us is devoid of any meaningful evidence" supporting Petitioner's claim of discriminatory prosecution of bigamy. *Id.*

Jurisdiction. The Utah Supreme Court rejected Petitioner's challenge to the trial court's jurisdiction over the unlawful sexual conduct charges. *Id.* at ¶¶ 92-97. Petitioner had argued that the evidence was insufficient to show that the two unlawful sexual conduct charges were committed in Utah. The Utah Supreme Court held that the trial court clearly did have jurisdiction over the unlawful sexual conduct charges, because Ruth Stubbs testified at trial that she and Petitioner regularly engaged in sexual intercourse in their Hildale, Utah home. *Id.* at ¶ 97.

Concurrence and dissent. Justice Nehring, in a separate opinion, concurred "in the judgment of the majority," but wrote "separately to address several of the important criticisms of the majority's analysis made by the Chief Justice" in her dissent. *Holm*, 2006 UT 31, ¶ 107 (Nehring, J., concurring).

Chief Justice Durham concurred in upholding Petitioner's convictions for unlawful sexual conduct with a minor, but dissented as to the bigamy conviction. *Id.* at ¶ 131 (Durham, C.J., concurring in part and dissenting in part). The Chief Justice dissented from the majority's interpretation of the "purports to marry" prong of the bigamy statute and would have reversed the bigamy

conviction on that ground. *Id.* at ¶ 147. She would have also reversed the bigamy conviction as unconstitutional under the religious freedom provision of the Utah Constitution. *Id.* at ¶ 166. Because the Chief Justice would have reversed on state statutory and state constitutional grounds, she did not dissent "based on the majority's analysis of Holm's federal constitutional claims." *Id.* at ¶ 180. She nevertheless opined that Utah's bigamy statute is unconstitutional under the Due Process Clause on the theory that *Lawrence* prohibited government intrusion into the private intimate relationships of consenting adults. *Id.* at ¶¶ 180-87.

REASONS FOR DENYING THE WRIT

I. Petitioner's First Issue Challenges Only the Concurring Opinion.

Petitioner first contends that the "Utah Supreme Court felt constrained to end its constitutional analysis of polygamy with *Reynolds* [*v. United States*, 98 U.S. 145 (1879)] because it believed that *Reynolds* is controlling precedent." Pet. at 10. In support, Petitioner quotes from Justice Nehring's concurring opinion:

> I believe that *United States v. Reynolds*, 98 U.S. 145 (1879), blocks any ambitions that *Lawrence* might have to seize polygamy and draw the practice of plural marriage within the protection of the Constitution . . . The precedent of *Reynolds* standing alone is sufficient to insulate Utah's bigamy statute from attack under the United States Constitution.

Pet. at 10-11 (quoting *Holm*, 2006 UT 31, ¶¶ 128-29 (Nehring, J., concurring) (ellipsis added).

Petitioner essentially argues, based on Justice Nehring's comments, that the majority opinion mistakenly believed that *Reynolds*, a free exercise case, precluded it from addressing whether the bigamy statute violated other federal constitutional provisions, such as the due process liberty interests addressed in *Lawrence v. Texas*, 539 U.S. 558 (2003). Petitioner accordingly frames his first issue, not as a conflict between the bigamy statute and *Reynolds*, or as a conflict between the bigamy statute and *Lawrence*, but as a conflict between *Reynolds* and *Lawrence*.

While the concurring opinion speculates that *Reynolds* precludes application of *Lawrence,* the majority opinion drew no connection between *Reynolds* and *Lawrence*. It relied on *Reynolds* only in addressing Petitioner's free exercise challenge to Utah's bigamy statute. Although Petitioner had argued that "*Reynolds* is 'nothing more than a hollow relic of bygone days of fear, prejudice, and Victorian morality,'" the Utah Supreme Court found *Reynolds* controlling with respect to the free exercise claim. *Holm*, 2006 UT 31, ¶ 50. The court noted that "despite its age, [*Reynolds*] has never been overruled by the United States Supreme Court and, in fact, has been cited by the Court with approval in several modern free exercise cases, signaling its continuing vitality." *Id.* (citing *Green*, 2004 UT 76, ¶ 19 (citing *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 876-77 (1990), and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993))).

The majority then noted that it had "recently rejected an identical argument in *State v. Green*, 2004 UT 76,

¶¶ 18-19, 99 P.3d 820." *Id.* In that bigamy prosecution, which involved another religiously motivated polygamist who married several underage girls, the Utah Supreme Court rejected an attack on *Reynolds*, but then analyzed the free exercise claim under the more modern cases of *Smith* and *Lukumi*. *See Green*, 2004 UT 76, ¶¶ 17-31. Applying the foregoing cases, the Utah Supreme Court concluded that "Utah's bigamy statute is a neutral law of general applicability and that any infringement upon the free exercise of religion occasioned by that law's application is constitutionally permissible." *Holm*, 2006 UT 31, ¶ 51 (citing *Green*, 2004 UT 76, ¶ 33).

The majority opinion, however, never suggested that *Reynolds* had anything to say about whether Utah's bigamy statute infringed on due process liberty interests under *Lawrence*. On the contrary, after concluding that Petitioner could not avail himself of the Free Exercise Clause to escape his bigamy conviction, the majority "turn[ed] to [Petitioner's] claim that his conviction violates his individual liberty interests protected by the Due Process Clause of the Fourteenth Amendment." *Id.* at ¶ 52. The majority then discussed Petitioner's due process liberty interests in an entirely different section, in which *Reynolds* is never cited. *See id.* at ¶¶ 53-63.

Thus, Petitioner's first issue is, in reality, a challenge not to the majority opinion, but only to an off-handed comment in the concurring opinion. This Court should not grant certiorari to review the ruminations of a lone concurring justice. *See also Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 168-69 (2004) (this Court will not review issues neither raised nor addressed below) (citing *Adarand Constr., Inc. v. Mineta*, 534 U.S. 103, 109 (2001)).

II. Because This Case Involves a Minor, Petitioner Lacks Standing to Challenge State Criminalization of "Private Polygamous Relationships Between Consenting Adults."

Petitioner's second issue is couched as whether "state criminalization of private polygamous relationships *between consenting adults* violates the liberty protected by the Due Process Clause of the Fourteenth Amendment." Pet. at i (emphasis added). In other words, Petitioner attacks Utah's bigamy statute under this Court's decision in *Lawrence*. Petitioner lacks standing to raise this claim because his case involves a minor, not consenting adults.

"In every federal case, the party bringing the suit must establish standing to prosecute the action." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004). "'In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.'" *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). This Court's standing jurisprudence contains two strands: "Article III standing, which enforces the Constitution's case-or-controversy requirement, and prudential standing, which embodies 'judicially self-imposed limits on the exercise of federal jurisdiction.'" *Id.* (Citations omitted). To show Article III standing, the plaintiff "must show that the conduct of which he complains has caused him to suffer an 'injury in fact' that a favorable judgment will redress." *Id.* at 12. Prudential standing, which is "closely related to Art. III concerns," "encompasses 'the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches,

and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.'" *Id.* (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)). In other words, a "'plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Conn v. Gabbert*, 526 U.S. 286, 292-93 (1999) (quoting *Warth*, 422 U.S. at 499).

Here, Petitioner does not seek to vindicate *his* due process liberty interest: he does not ask this Court to hold that he has a due process liberty interest in having a polygamous sexual relationship with a minor girl, which is what he was prosecuted for. Rather, he asks this Court to declare, under *Lawrence*, that hypothetical consenting adults, who have yet to be prosecuted, have a due process liberty interest in polygamous relationships. Under the foregoing authorities, Petitioner lacks standing to assert that Utah's bigamy statute violates the due process liberty interests of third parties not before this Court. *See also Gratz v. Bollinger*, 539 U.S. 244, 289 (2003); *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

Related prudential reasons also argue for denying the writ on this issue. Petitioner mounts, in effect, a facial challenge to Utah's bigamy statute under substantive due process. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). The fact that a statute "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since [this Court has] not recognized an 'overbreadth' doctrine outside the limited context of the First

Amendment." *Id.*[3] In other words, to prevail on this claim, Petitioner must show that the bigamy statute violates substantive due process in all of its applications, beginning with this one. If Petitioner cannot show that the bigamy statute violates his due process liberty interests, he cannot show that the statute is unconstitutional in all its applications.

Petitioner, however, cites only one circumstance in which the statute might infringe on due process liberty interests – when consenting adults agree to private polygamous relationships. Petitioner carefully omits from the statement of the issue his own circumstance – an adult man entering into a polygamous relationship with an underage girl. The omission is telling. This Court in *Lawrence* relied heavily on the absence of minors in holding that the consenting adults in that case had a liberty interest in being free from governmental interference with their private intimate relationship:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.

Lawrence, 539 U.S. at 578.

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[3] That exception does not apply here, because Petitioner raises a Fourteenth Amendment Due Process Claim, not a First Amendment claim.

In contrast, the Utah Supreme Court relied heavily on the presence of a minor in this case to conclude that Petitioner's due process liberty interests were not implicated by his bigamy conviction. *Holm*, 2006 UT 31, ¶¶ 62-63 ("this case features another critical distinction from *Lawrence*; namely, the involvement of a minor"; "The contrast between the present case and *Lawrence* is even more dramatic when the minority status of Stubbs is considered"). Consequently, even if this Court did hold that the bigamy statute violates the liberty interests of consenting adults, that would not help Petitioner, who entered into an arranged bigamous relationship with an unsophisticated minor. Accordingly, this Court should deny the writ as to Petitioner's second issue.

III. Petitioner's Equal Protection and Free Exercise Claims Do Not Raise an Issue of Widespread National Importance and this Case is Not a Suitable Vehicle for Addressing Those Claims.

Petitioner's third issue asserts that Utah's bigamy statute targets religion "by making participation in a private religious ceremony an element of the crime." Pet. at i. This, he contends, violates equal protection guarantees because he and other religiously-motivated bigamists are selectively prosecuted under the statute. Pet. at 18-22. He contends that Utah's bigamy statute violates the Free Exercise Clause because the statute is not neutral and generally applicable. *Id.* at 22-28.

This Court should deny the writ as to both these claims, because they raise no issue of widespread national importance and because this case does not present a suitable vehicle for addressing them.

A. The equal protection claim is nothing more than a narrow selective prosecution challenge for which there is no record support.

Petitioner contends that Utah's bigamy statute "discriminates on the basis of religious affiliation" because he was prosecuted based on his participation in a non-legal religious ceremony with Ruth Stubbs, while "numerous classes of persons other than religious polygamists" engaging in essentially the same behavior are "virtually" never prosecuted. Pet. at 19-20. In other words, Petitioner argues that he is the subject of impermissible selective prosecution based on his religious beliefs. Thus, his equal protection claim does not attack the bigamy statute itself, only its alleged discriminatory application to him.

This is not an issue of widespread national importance. Petitioner himself calls Utah's bigamy statute "unique." Pet. at 24. He points to no other similar prosecutions in other states. Indeed, prosecutions under Utah's bigamy statute are rare, with only two modern reported decisions before this one. *See State v. Green*, 2004 UT 76, 99 P.3d 820; *State v. Geer*, 765 P.2d 1 (Utah App. 1988). Thus, any decision by this Court on Petitioner's selective prosecution claim will have no widespread, national effect and the issue is unlikely to recur.

Additionally, because Petitioner did not make a record below, this case is not a suitable vehicle for addressing whether he was selectively prosecuted solely because of his religious beliefs. To prevail on such a claim, Petitioner would have to show "some evidence of both discriminatory effect and discriminatory intent." *United States v. Bass*, 536 U.S. 862, 863 (2002) (per curiam). To show discriminatory effect, Petitioner must make a "'credible showing'" that "'similarly situated individuals of a different [religion] were

not prosecuted.'" *Id.* (quoting *United States v. Armstrong*, 517 U.S. [illegible], 465 (1996)). As the Utah Supreme Court recognized, the record in this case "is devoid of any meaningful evidence supporting" Petitioner's discriminatory prosecution claim. *Holm*, 2006 UT 31, ¶ 66. Without such a record, this Court could not address the merits of Petitioner's selective prosecution claim.

Petitioner seeks to fill the record gap by claiming that the State does not prosecute other "[n]umerous classes of people within the State [who] engage in intimate private conduct . . . including those who cohabit with one person while awaiting legal divorce from someone else, who otherwise engage in adulterous cohabitation or other adulterous relationships, who cohabit or engage in sexual relationships without being legally married, who participate in same-sex commitment ceremonies while cohabitating, or who officiate at commitment ceremonies that do not meet the State's definition of legal marriage ceremonies." Pet. at 19-20. Nothing in the record supports these allegations by counsel. But even assuming, *arguendo*, that they are true, Petitioner does not show or even allege that any members of those "numerous classes" are situated similarly to him: cohabiting with a minor as a polygamous wife. Petitioner thus lacks the factual context for a colorable equal protection claim.

Moreover, the only two previous reported modern prosecutions under Utah's bigamy statute refute any claim of selective religious prosecution. As the Utah Supreme Court noted, one of those cases involved a secular bigamist who, ironically, argued unsuccessfully "that the State of Utah selectively prosecutes 'only those bigamists who practice bigamy for other than religious reasons.'" *Holm*, 2006 UT 31, ¶ 66 (quoting *Green*, 2004 UT 76, ¶ 28, n.10 (quoting

Geer, 765 P.2d at 3)) (internal quotation marks omitted). The other case involved a religious bigamist who, like Petitioner, took underage girls as his bigamous brides. *See Green*, 2004 UT 76, ¶¶ 1-10, 40 n.14. The reasonable inference from this and those cases is that bigamy prosecutions in Utah are rare and target predatory behavior. This conclusion is strengthened by Petitioner's own contention, Pet. at 19-20, that thousands of religious believers are practicing polygamy in Utah and surrounding states, and yet he can point to no bigamy prosecutions among them other than two instances involving minors.

In short, this case does not present a question of widespread national importance. It also does not present a suitable vehicle for Petitioner's selective prosecution claim, where Petitioner did not make an adequate record below. More importantly, what record does exist suggests that he was singled out not because of his religious beliefs, but because of the age of his victim.

B. The free exercise claim is nothing more than a disagreement with the state court's conclusion that Utah's bigamy statute is neutral and generally applicable.

Petitioner's free exercise claim is premised on the theory that Utah's bigamy statute unfairly targets religion "by making participation in a private religious ceremony an element of the crime." Unlike the selective prosecution claim, which attacks the application of the bigamy statute to Petitioner, this claim attacks the validity of the bigamy statute itself under the Free Exercise Clause.

Some background is helpful in understanding why this Court should deny the writ as to this claim. In *Reynolds,* this Court held that a federal statute banning polygamy, consensual or otherwise, in U.S. territories did not violate the Free Exercise Clause. The *Reynolds* Court essentially held that the Free Exercise Clause does not require government to grant religious exceptions to general criminal statutes, so long as the subject of the statute's regulation falls within the legitimate exercise of legislative authority. *See* 98 U.S. at 162-67. In 1990, this Court reaffirmed that general holding in *Smith*, 494 U.S. at 878-79. *Smith* stated the rule thus: "[V]alid and neutral statutes of general applicability" need not be justified by a compelling state interest, even though the statutes may incidentally burden a religious practice. *Id.* at 879-80, 882-88.

This Court has since explained that a law is not neutral if its object "is to infringe upon or restrict practices *because of their religious motivation* . . . " or if the law targets "religious conduct for distinctive treatment." *Lukumi*, 508 U.S. at 533-34 (emphasis added). Obviously, a law "lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Id.* at 533. A facially neutral statute, however, may still impermissibly target religious conduct in its practical effect. *Id.* at 534-35. An "adverse impact" on religion does not by itself prove "impermissible targeting." *Id.* This is because "a social harm may have been a legitimate concern of government for reasons quite apart from discrimination." *Id.* (citing *McGowan v. Maryland*, 366 U.S. 420, 422 (1961) and *Reynolds*, 98 U.S. 145). Thus, the key inquiry for determining whether a statute is neutral in its operation is not whether it adversely affects religion,

but whether it defines categories in such a way as to treat religion unfairly. *See id.* at 534.

Petitioner alleges a split of authority on this issue by asserting that the "circuits and the state courts are conflicted and confused over the meaning of general applicability." Pet. at 22. Petitioner asserts that "[n]umerous courts have applied general applicability as if it were merely a synonym for facial neutrality." *Id.* at 22-23. "Other courts," according to Petitioner, "have understood and applied the term as a test for impermissible underinclusion." *Id.* at 23. Petitioner, however, never explains why these two approaches, if truly different, are mutually exclusive or result in an irreconcilable conflict of authority.

Reduced to its core, Petitioner's free exercise claim is nothing more than a bid to have this Court act as a correction-of-error court. Petitioner does not ask this Court to overrule either *Reynolds* or the free exercise analysis it adopted in *Smith* and applied in *Lukumi*. Nor does he complain that the Utah Supreme Court applied incorrect law or analysis to this claim. Petitioner merely disagrees with the Utah Supreme Court's conclusion that Utah's bigamy statute is a neutral law of general applicability. Yet, Petitioner himself concedes that Utah's bigamy statute is facially neutral. Pet. at 27.

The only question before this Court, then, would be whether under *Lukumi*, Utah's bigamy statute – which Petitioner concedes is facially neutral and unique – defines categories in such a way as to treat religion unfairly. It clearly does not. To the contrary, it is drafted to catch all bigamists in its net, irrespective of their subjective motivations: A person commits bigamy "when, knowing he has a husband or wife . . . , [he] purports to marry another person

or cohabits with another person." Utah Code Ann. § 76-7-101. As the Utah Supreme Court concluded, "the statute is designed to punish behavior regardless of the motivation giving rise to that behavior." *Holm*, 2006 UT 31, ¶ 65.

Petitioner claims that the statute shows animus against religion because only religious bigamists are prosecuted for solemnizing their second marriages in private, unlicensed religious ceremonies or for cohabiting with another person. Pet. at 22-28. He tries to bolster his claim by incorrectly asserting that the bigamy statute makes "participation in a private religious ceremony an element of the crime." Pet. at i. In fact, participation in a private religious ceremony is not an element of bigamy in Utah, and never has been. Nothing in the statute suggests that participation in a private religious ceremony is an element of the crime.

In sum, Utah's bigamy statute is a valid and neutral statute of general applicability. It does not target religious groups. Nor has it been selectively applied. Again, the only three modern reported prosecutions, including this one, were against two men who took underage girls as their bigamous brides, and a secular bigamist who claimed that he was being unfairly targeted for *not* being a religious bigamist. If any group is being singled out for prosecution, it is predators.

This Court should deny the writ with respect to Petitioner's third issue.

IV. Petitioner's Fourth Issue Attempts to Inflate a Garden Variety State Jurisdictional Claim into a Federal Constitutional One.

Petitioner's fourth, and final, issue goes only to the unlawful sexual conduct convictions. Petitioner asks whether his due process and confrontation rights were violated "when the State failed to prove the jurisdictional elements of the crime, and when the trial court sustained the State's objection to Petitioner's effort to prove that the alleged acts took place outside the State of Utah." Pet. at i. Petitioner's constitutional claims were neither raised nor addressed below. Thus, this issue is nothing more than a belated attempt to inflate a garden variety jurisdictional issue into a federal constitutional claim to obtain certiorari review. This Court should therefore deny the writ. *See Cooper Indus., Inc.*, 543 U.S. at 168 (this Court does not consider issues not raised or ruled on below).

In Utah, territorial jurisdiction is not an element of the offense to be decided by a jury beyond a reasonable doubt. *See* Utah Code Ann. § 76-1-501(3). Rather, the judge, if requested, must decide before trial whether Utah has jurisdiction over the offense. *See id.*; Utah Code Ann. § 76-1-201(5); *see also State v. Payne*, 892 P.2d 1032, 1033 (Utah 1995). The prosecution bears the burden of proving jurisdiction by a preponderance of the evidence. *Id.* Utah has jurisdiction to prosecute an offense if "the offense is committed either wholly or partly within the state." Utah Code Ann. § 76-1-201(1).

Below, Petitioner challenged the sufficiency of the evidence showing that the two unlawful sexual conduct charges for which he was convicted took place in Utah. *Holm*, 2006 UT 31, ¶ 92. Petitioner never disputed that he committed the charged acts – engaging in sexual

intercourse with Ruth Stubbs, a minor, in Utah. He nevertheless claimed that to establish jurisdiction, the State had to prove that their two children were conceived in Utah. *Id.* at ¶¶ 94-96.

The thrust of Petitioner's claim below was simply that the State failed to prove jurisdiction. One sentence in his brief below asserted that he had "a constitutional right to confront Ms. Stubbs and to obtain the answer" to whether her two children could have possibly been conceived outside of Utah. Br. Aplt. at 53. He then continued with his contention that the State had failed to meet its jurisdictional burden. *Id.* at 53-54.

The Utah Supreme Court accordingly treated Petitioner's claim strictly as a challenge to the sufficiency of the evidence establishing territorial jurisdiction. *Holm*, 2006 UT 31, ¶ 92-97. The court held that conception was not an element of the crime of unlawful sexual conduct with a minor and, therefore, it did not matter where the children were conceived for purposes of determining jurisdiction. *Id.* at ¶ 95. The court then concluded that it was "clear that the trial court did have jurisdiction," where Ruth Stubbs testified at trial that she regularly had sexual intercourse with Holm in their Utah home during the charged periods. *Id.* at ¶ 97. The Utah Supreme Court never addressed the federal constitutional claim that Petitioner now advances for the first time in his petition, nor was it asked to.

Because this issue was neither presented below nor ruled upon, this Court should deny the writ as to this issue.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MARK L. SHURTLEFF
Utah Attorney General
KIRK M. TORGENSEN
Chief Deputy Attorney General
J. FREDERIC VOROS, JR.
Chief, Criminal Appeals Div.
LAURA B. DUPAIX*
Assistant Attorney General
Counsel for Respondent
Utah Attorney General's Office
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
(801) 366-0180

**Counsel of Record*